

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

UNITED CHURCH OF CHRIST, et al.,	:	Case No. 1:00CV0661
	:	
Plaintiffs,	:	JUDGE O'MALLEY
	:	
v.	:	<u>MEMORANDUM & ORDER</u>
	:	
GATEWAY ECONOMIC DEVELOPMENT	:	
CORP. OF GREATER CLEVELAND	:	
	:	
Defendant.	:	

This action is brought by approximately 25 Plaintiffs against defendant Gateway Economic Development Corporation of Greater Cleveland (“Gateway”), which owns and operates the “Gateway Complex” in downtown Cleveland, Ohio.¹ The Plaintiff group includes both individuals and organizations, “all [of whom] seek to protest the adoption and continued use of the name ‘Indians’ and the cartoon character ‘ChiefWahoo’ as the name and mascot respectively of the Cleveland Indians Baseball Company, Inc. [‘Indians’].” Complaint at ¶2. The Plaintiffs allege that Gateway has promulgated and acted in accordance with a policy of “den[ying] access to members of the public seeking to engage in peaceful protest on the streets, sidewalks, parks, plazas and pedestrian malls which are part of the Gateway

¹ The “Gateway Complex” includes the baseball stadium known as Jacobs Field, the indoor known as Gund Arena, and certain other buildings and surrounding properties. The specific physical characteristics of the Gateway Complex are discussed below in much more detail; see Defendant’s Exhibit 1, attached at the end of this opinion.

Complex.” Id. at ¶33. Plaintiffs claim that, in doing so, Gateway has violated (and will continue to violate) their First Amendment rights.

On March 28, 2000, Plaintiffs moved for a preliminary injunction (docket no. 6), asking the Court to “prohibit [Gateway] . . . from denying, prohibiting, or forbidding the Plaintiffs . . . from peacefully assembling and protesting on the sidewalks, pedestrian plazas, and/or pedestrian malls of the Gateway Complex on April 14, 2000.” The date of April 14, 2000 is important because it is “Opening Day” – the day of the Indians’ first home baseball game of the 2000 season. After receiving extensive briefing from the parties,² the Court held a preliminary injunction hearing on April 11-12, 2000. Having considered all of the evidence and arguments, the Court now rules that Plaintiffs’ motion for preliminary injunction is **DENIED**. The Court does not enjoin Gateway from prohibiting the Plaintiffs from assembling and protesting on any area within the Gateway Complex, including Eagle Avenue, North Drive, Gateway Plaza, and Bob Feller Plaza; however, Gateway must continue to allow protests at Locations A and B, defined below.

Further, the Court rules as follows on these other pending motions:

- Ⓒ Gateway’s motion to transfer this case to Judge Manos, as related to case no. 95-CV-1003, (docket no. 3) is, upon consultation and concurrence with Judge Manos, **DENIED**.
- Ⓒ Gateway’s motion to strike certain exhibits, and to expedite consideration thereof (docket no. 13)

² The briefs offered by both Gateway and the Plaintiffs were especially well-written and well-researched, especially in light of the abbreviated briefing period allowed. As noted below, because of the tight deadline imposed on it by Opening Day, the Court does not reach many of the issues raised by the parties in this Order, although the Court will, ultimately, probably have to reach these issues when it addresses the matter on the merits.

is **DENIED**.

C Gateway's motion to dismiss (docket no. 14) is **DENIED**.³

The Court's reasoning follows.

I. Procedural Motions.

The Court first addresses the following procedural motions, before turning to the motion for preliminary injunction.

A. Motion to Transfer.

This is the second time that Gateway has been sued in federal court by plaintiffs seeking to protest on property located within the Gateway Complex. In Helphrey v. Gateway Economic Development Corporation of Greater Cleveland, No. 95-CV-1003, a number of plaintiffs sought essentially the same relief as that requested by Plaintiffs here. Helphrey was resolved when the Honorable John M. Manos entered a Final Agreed Order, in which Gateway agreed to allow the Helphrey plaintiffs to "demonstrate on Gateway Property on no more than four (4) days during each of the months of [April through October] of each year," and only at two areas, designated as Location A and Location B, with "no more than 30 demonstrators . . . allowed within Location A and no more than 40 demonstrators . . . allowed within Location B." Helphrey Order at 2 (Sept. 8, 1995). As shown on Defendant's Exhibit 1, Location A is a designated area within Gateway Plaza near Jacobs Field's Gate A, and Location B is a grassy area just

³ Plaintiffs' motion for expedited discovery (docket no. 5) was previously **GRANTED IN PART** and **DENIED IN PART**.

north of Bob Feller Plaza and Jacobs Field's Gate C.

With their motion to transfer, Gateway seeks to transfer this case to Judge Manos as related to Helphrey. Transfer is appropriate only when both the transferor and transferee Judges concur that a transfer would be wise. Local Rule 3.1(b)(3). The decision is highly discretionary, with the primary consideration being whether transfer would conserve judicial resources. Helphrey was filed several years ago, predating substantial experience with the Gateway complex and certain developments in relevant areas of the law. Helphrey was also resolved prior to any consideration of the merits and in the absence of a full development of the record before the trial judge. And, none of the plaintiffs in this action were parties to the Helphrey case. For these reasons, and other considerations of judicial efficiency and economy, both Judge Manos and the undersigned concur that transfer is not appropriate. Accordingly, the motion for transfer is denied.

B. Motion to Strike.

In response to Plaintiffs' motion for preliminary injunction, Gateway has moved to strike certain declarations and other exhibits submitted by Plaintiffs. Gateway asserts several bases for this motion, including that the declarations are completely irrelevant and that other exhibits contain hearsay. Gateway does not propose a viable means, however, for this Court to strike the allegedly objectionable evidence.

While some courts have employed Rule 12(f) to strike an affidavit or portions thereof, McLaughlin v. Copeland, 435 F. Supp. 513 (D.C. Md. 1977), there is no basis in the Federal Rules for doing so. In fact, at least one reported decision in this district, affirmed by the Sixth Circuit Court of Appeals, refused

to employ Rule 12(f) to strike an affidavit because “the rule relates only to pleadings and is inapplicable to other filings.” Dawson v. City of Kent, 682 F. Supp. 920 (N.D. Ohio 1988), affirmed, 865 F.2d 257 (6th Cir. 1988). Therefore, the motion to strike the declarations and other evidence is denied. The Court has, however, excluded from its consideration those portions of the evidence that are not based on personal knowledge, irrelevant, or otherwise inadmissible.⁴ Furthermore, the Court considers the declarations in a light most favorable to Gateway, and has given the testimony the weight it deserves. Theunissen v. Matthews, 935 F.2d 1454, 1458-59 (6th Cir. 1991).

C. Motion for Expedited Discovery.

Plaintiffs asked the Court for leave to engage in limited written discovery and to obtain the deposition of Gateway Executive Director Richard Owens, all before the preliminary injunction hearing. Earlier, the Court orally granted this motion in part, in a telephone conference call with the parties. Accordingly, the motion is now denied as moot.

II. Facts.

The Court now turns to Plaintiffs’ motion for preliminary injunction. Set forth below is certain

⁴ As the parties point out, a Court may consider hearsay evidence in support of a request for preliminary injunctive relief, even though such evidence would be inadmissible in a trial on the merits of the plaintiffs’ underlying claims. A Court must, however, employ caution in consideration of such evidence, considering only hearsay with strong indicia of reliability and avoiding placing undue weight on such testimony; this Court has employed the appropriate measure of caution in its consideration of the declarations.

evidence upon which the Court relies to base its opinion.⁵ Gateway is a non-profit corporation organized to construct and operate a sports complex in the City of Cleveland. See Northern Ohio Chapter of Associated Builders & Contractors, Inc. v. Gateway Economic Development Corp. of Cleveland, 1992 WL 119375 at *1-4 (N.D. Ohio May 12, 1992) (hereinafter, “NOCAB”) (describing the emergence and role of Gateway). Today, it owns and operates property known as the Gateway Complex. The Gateway Complex is located in downtown Cleveland, lying on property roughly shaped like a thick letter “L.” The city streets surrounding the Gateway Complex are Carnegie Avenue, East Ninth Street, Bolivar Road, East Seventh Street, Huron Road, and Ontario Street. The property within the Complex includes: (1) Jacobs Field; (2) Gund Arena; (3) a parking garage; and (4) certain “common areas.” The common areas are the focus of this case.

Two rings of property lay between the city streets surrounding the Complex and the buildings owned by Gateway – the “Public Sidewalk” and the “Gateway Sidewalk.” The Public Sidewalk is the exterior ring, laying between the city streets and the edge of the Gateway property. The Public Sidewalk is clearly public property; it varies in width, generally ranging roughly from 10 to 20 feet.⁶ Inside this Public Sidewalk is the Gateway Sidewalk, laying on Gateway-owned property as a part of the Gateway Complex. The Gateway Sidewalk lays between the Public Sidewalk and the buildings and plazas inside the Gateway Complex; it also varies in width, generally ranging roughly from 10 to 20 feet. In certain areas, in between

⁵ As explained below in section IV of this Order, the Court does not reach the merits of several issues raised by the parties. Accordingly, the evidence recounted here does not include facts that would be critical to those issues, which remain for decision following a full trial or merits briefing.

⁶ At certain corners, however, such as the corner of Carnegie and East Ninth Street, the public sidewalk is much wider. All of the measurements stated in this Opinion are rough approximations, taken from the scale drawing submitted as Defendant’s Exhibit 1.

the Public Sidewalk and the Gateway Sidewalk are 15-foot-wide planter boxes, containing trees; the imaginary line made by connecting these trees at their center point delineates the Gateway property line.

In addition to the Gateway Sidewalks, the common areas of the Gateway complex include: (1) Gateway Plaza, an area roughly 125' by 350', which is in the center of the Complex between Gate A of Jacobs Field and Gund Arena; (2) Bob Feller Plaza, an area roughly 125' by 100', which is at the corner of East Ninth Street and Eagle Avenue next to Gate C of Jacobs Field; (3) Eagle Avenue, which runs from East Ninth Street west through the Complex to Gateway Plaza, passing alongside Bob Feller Plaza and running behind Jacobs Field; (4) East 6th Street, which runs from Huron Road south through the Complex to Gateway Plaza; (5) North Drive, which runs from Ontario Street east to the parking garage, between Gateway Plaza and Gund Arena; (6) an unnamed plaza, partially grass-covered and partially paved, at the corner of Bolivar Road and East Ninth Street, which is across Bolivar Road from Bob Feller Plaza and which contains an area roughly 125' x 200'; (7) an unnamed plaza at the corner of Huron Road and Ontario Street, next to the Huron Entrance to Gund Arena, triangular in shape with sides measuring roughly 125', 150', and 200'; and (8) two roughly triangular grassy areas near the corner of Carnegie Avenue and East Ninth Street. Notably, Eagle Avenue, East 6th Street, and North Drive are not publicly dedicated roadways; these roads lay within the Gateway Complex and are owned and maintained by Gateway.

While the northern and eastern borders of the L-shaped property are across the street from restaurants and other businesses, the southern and western borders of the property separate Gateway from highways and manufacturing areas. Thus, virtually all of the pedestrian traffic going into the Gateway Complex comes from the north and east. The evidence suggested that, at the Indians' Home Opener: (1) approximately 42,000 fans would attend the game; (2) between 15-20,000 of those fans would enter the

stadium through Gate C, walking south on East Ninth Street and traversing Bob Feller Plaza to do so; and (3) between 10-20,000 fans would enter the stadium through Gates A and B, walking southeast on Ontario Street, turning northeast on North Drive, and traversing Gateway Plaza to do so. A very small number of fans enter the stadium at Gate D, near the corner of Carnegie Avenue and Ontario Street; some fans enter Gates A & B by following East 6th Street south or Eagle Avenue west into Gateway Plaza; and some fans drive into the Gateway parking garages and travel from the garage to Gates A, B, or C.

Given this pedestrian traffic flow, the following areas are extremely busy during the hour or so before a baseball game begins, and during the hour or so after it ends:⁷ (1) all of Gateway Plaza itself; (2) Eagle Avenue and North Drive, which lead into Gateway Plaza; (3) the Public Sidewalk and Gateway Sidewalk that leads from the corner of Huron and Ontario to Gateway Plaza; (4) all of Bob Feller Plaza; and (5) the Public Sidewalk and Gateway Sidewalk that lead from the corner of Bolivar Road and East Ninth Street to Bob Feller Plaza.

In order to deal with the great pedestrian traffic flows during baseball games, Gateway and the Indians agreed that Gateway would not “conduct promotions, festivals, shows, displays, and other activities and events in the Common Areas during any [baseball game].” Gateway enforces this agreement by, inter alia, prohibiting any and all persons from engaging in organized events, protests, solicitations, and so on, in the common areas during baseball games. Thus, for example, Gateway has ordered off the Gateway Plaza and the Gateway Sidewalks: (1) off-duty firemen soliciting money to fight muscular dystrophy; (2) employees of adult entertainment establishments inviting fans to visit after the game; (3) union members

⁷ These areas are less busy, but still busy, during the game itself.

seeking support; (4) employees of the Cleveland Plain Dealer Newspaper, seeking to give away or sell their product; (5) members of different religious organizations who proselytize their views; and, forming the basis for this action, (6) persons protesting the baseball team's use of the name "Indians" and the cartoon character "Chief Wahoo" by leafleting, carrying signs, or chanting slogans. Gateway tells these persons that they may pursue their activity while standing on the Public Sidewalks laying just outside the Gateway Sidewalks, but they may not pursue their activity on Gateway property.

There are essentially three exceptions to the Gateway policy prohibiting persons from engaging in organized protesting, solicitation, and so on, in the common areas. First, as noted above, Gateway agreed to allow the plaintiffs in the Helphrey case to demonstrate in certain sub-areas of the common area, under certain circumstances. The two sub-areas where the Helphrey plaintiffs are allowed to demonstrate, pursuant to the Helphrey Final Agreed Order, are marked on Defendant's Exhibit 1 as Location A and Location B. Location A is an area, roughly 100' x 120', at the western end of Gateway Plaza. Location A is bound by the Gateway Sidewalk on the west, North Drive on the north, two light sculptures (also referred to as "pylons") on the east, and the western-most end of Eagle Avenue on the south. Location B is a trapezoidal, grassy area within the unnamed plaza at the corner of Bolivar Road and East Ninth Street, which is across Bolivar Road from Bob Feller Plaza. These two areas, being a stone's throw from Gates A and C, place the Helphrey plaintiffs next to, but not directly in, the flow of the vast majority of pedestrians entering Jacobs Field. Further, the evidence was undisputed that Gateway has allowed not only the Helphrey plaintiffs to demonstrate in Locations A and B, but also any other persons or organizations who wish to demonstrate against the Indians' use of their name and mascot, provided those persons comply with the conditions imposed upon the Helphrey plaintiffs in the Final Agreed Order.

The second exception to the Gateway policy prohibiting persons from engaging in activities in the common areas during event periods comes through Gateway's Baseball Facility Agreements with the Indians. Essentially, these Agreements allow the Indians to invite certain entities to locate within the common areas during baseball games for the purposes of promoting or enhancing fan enjoyment of the game. As an example, the Indians have allowed radio stations to broadcast from tents set up in Gateway Plaza during high-profile games, such as the World Series.

The third exception to the Gateway policy prohibiting persons from engaging in activities in the common areas is that Gateway, itself, allows persons to hold events on the Gateway Complex common areas on days that athletic events are not occurring in the stadium or arena. Thus, any person may apply to Gateway for permission to hold an event on Gateway grounds on a non-game-day. Gateway "reserves the right, in its sole and absolute discretion, to accept, reject, or accept upon conditions any Application for Permit" to hold an event on Gateway grounds. Gateway brief in opp. exh. D at 4. To date, however, Gateway has never denied an applicant permission to hold an event on Gateway grounds, so long as the applicant has met the procedural requirements (e.g., payment of security deposit and submission of site plan).

The Plaintiffs in this case have not sought to take advantage of any of these exceptions. For example, the Plaintiffs have not asked Gateway for permission to demonstrate in Locations A and B during Opening Day of 2000, even though Gateway has suggested this alternative to Plaintiffs' counsel in writing. Nor have Plaintiffs sought to demonstrate at Gateway during non-game days.⁸ Simply, the Plaintiffs believe

⁸ This is understandable, as Plaintiffs obviously wish to espouse their message to Indians fans as they gather at the stadium; a non-game day would not present much of an audience.

these alternatives are insufficient. The Plaintiffs hope to assemble in the northwest portion of Gateway Plaza (including, but not limited to, Location A); hold a press conference on the nearby steps of Gund Arena, which are adjacent to North Drive; march from there around the perimeter of the Gateway complex by traveling (on both Gateway and Public Sidewalks) south on Ontario Street, east on Carnegie Avenue, and north on East Ninth Street to Bob Feller Plaza; gather at Bob Feller Plaza for some period of time; continue from there west on Eagle Avenue to the grassy area in the heart of Gateway Plaza; and station themselves there for purposes of continuing their organized protest. Knowing that their plan will run afoul of Gateway's policy and possibly subject them to arrest or ejection from the property, Plaintiffs seek the preliminary injunction.

The Plaintiffs claim that the Gateway Complex was designed to be more than a destination for sporting events. They claim that one of the design objectives in the creation of the complex "was the creation of park-like public spaces . . . intended to be open to pedestrians for public use and enjoyment, and integrated into the surrounding urban fabric of the City." Plaintiffs brief at 6. Plaintiffs assert that "[i]t was hoped that the Gateway pedestrian malls and plazas would be used by the people for public events, as gathering places, and for the enjoyment of the people in much the same way as an urban park." *Id.* In support of these assertions, Plaintiffs primarily rely on a declaration by Thomas Chema, Gateway's former and first Executive Director. Plaintiffs proffered no testimony at the hearing to support their claim that the common areas of the Gateway Complex are, in fact, regularly-traversed or regularly-used public thoroughfares. Plaintiffs proffered no traffic studies, no statistical analysis, and no testimony (even from Plaintiffs themselves) regarding everyday use of or activities on the Gateway property.

Gateway asserts, to the contrary, that the Gateway Complex was designed for and is used and

maintained solely for purposes of hosting events (primarily sports events) at Gund Arena and Jacobs Field. Defendants support this assertion with the following evidence: (1) the enabling legislation, by which Gateway was formed for the purpose of “constructing and/or operating a sports complex,” NOCAB, 1992 WL 119375 at *2 (citing Ohio Rev. Code §307.696); (2) documents reflecting the belief (even of Mr. Chema himself) that the Gateway Complex property is private property intended to be used to facilitate events at Gund Arena and Jacobs Field; (3) testimony that few pedestrians use or traverse the common areas during non-event times; (4) testimony that the majority of the common areas (including Eagle Avenue) are blocked-off or barricaded from vehicular use during events; (5) testimony that events are held in either Jacobs Field or Gund Arena in excess of 250 days out of an average year; (6) testimony that at least some of the common areas are blocked off or restricted for other complex-related purposes on other days during the year; (7) Gateway’s contracts with its private tenants, agreeing to restrict access to (and to not itself use) the common areas during events; (8) Gateway’s use of a permitting process, restricting use of the common areas during non-event periods; and (9) testimony that Gateway has traditionally enforced restrictions on access to the common areas during event periods, essentially limiting access solely to those who are participating in or attending events.

III. Standards for Relief.

A preliminary injunction is a provisional remedy authorized under Fed. R. Civ. P. 65. It is “an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion.” Mazurek v. Armstrong, 117 S. Ct. 1865, 1867 (1997) (quoting 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure §2948 at 129-130 (2d ed.1995)).

When ruling on a motion for a preliminary injunction, “a district court must consider and balance four factors: (1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction.” Blue Cross & Blue Shield Mut. of Ohio v. Blue Cross & Blue Shield Ass’n, 110 F.3d 318, 322 (6th Cir. 1997).

“It is important to recognize that the four considerations applicable to preliminary injunctions are factors to be balanced and not prerequisites that must be satisfied. These factors simply guide the discretion of the court; they are not meant to be rigid and unbending requirements.” In re Eagle-Picher Indus., Inc., 963 F.2d 855, 859 (6th Cir. 1992). Thus, “the degree of likelihood of success required may depend on the strength of the other factors.” In re DeLorean Motor Co., 755 F.2d 1223, 1229 (6th Cir.1985). “In general, the likelihood of success that need be shown (for a preliminary injunction) will vary inversely with the degree of injury the plaintiff will suffer absent an injunction.” Friendship Materials, Inc. v. Michigan Brick, Inc., 679 F.2d 100, 105 (6th Cir. 1982) (citation omitted).

It is well-settled that the “single most important prerequisite” is usually a demonstration that if preliminary injunctive relief is not granted, the applicant will suffer “irreparable harm.” 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure §2948.1 at 139 (2d ed.1995). “Speculative injury is not sufficient; there must be more than an unfounded fear on the part of the applicant.” Id. at 153-54. The movant must show a presently existing actual threat. Only where the threatened harm would impair the ability to grant an effective remedy after trial is there a real need for preliminary relief. Id. at 149. Therefore, if a decision on the merits can be reached before actual injury would occur, there is no need for

interlocutory relief. Id. Similarly, a preliminary injunction will usually be denied if it appears that the applicant has an adequate alternate remedy in the form of money damages or other relief. Id. at 149-51.

The Court takes pains to add here that one factor having absolutely nothing to do with whether the Plaintiffs are entitled to the preliminary injunctive relief they seek is the substantive content of their speech. Whether this Court is sympathetic to the Plaintiffs' message is, of course, completely irrelevant to the question of whether there exists a likelihood that Gateway has violated the Plaintiffs' First Amendment rights.

IV. Analysis.

The parties generally agree that the Court must undertake a three-step analysis in this case. First, the Court must determine whether Gateway is a public actor. This is because "a private entity acting on its own cannot deprive a citizen of First Amendment rights." Lansing v. City of Memphis, 202 F.3d 821, 828 (6th Cir. 2000).⁹ Second, assuming Gateway is a public actor, the Court must determine whether the common areas in the Gateway Complex, upon which Plaintiffs wish to demonstrate, are traditional public fora, limited public fora, or nonpublic fora. This is because the degree of restriction of "access to

⁹ There are actually two steps to this part of the analysis. First, the Court must determine whether Gateway is a governmental entity, which Plaintiffs strenuously contend it is. Next, the Court must determine whether, even if Gateway is not a governmental entity, i.e., it is a private corporation, Gateway should be deemed a "state actor" for purposes of a First Amendment analysis. Essentially, the Court would need to assess whether Gateway serves a "public function" through the operation and maintenance of the common areas, or has a "symbiotic relationship" with one or more governmental actors. See Lansing v. City of Memphis, 202 F.3d 821, 828 (6th Cir. 2000) (outlining the tests to determine whether a "a private entity can be held to constitutional standards"). If either were true, Gateway would be a state actor vis-a-vis the First Amendment, even if not a governmental entity for other purposes. For the reasons explained, the Court does not resolve these issues at this time.

government property and the standards by which limitations on access must be evaluated vary according to the classification.” Calash v. City of Bridgeport, 788 F.2d 80, 82 (2nd Cir. 1986). And third, having determined what type of fora are the common areas in the Gateway Complex, the Court must determine whether Gateway’s policy meets the constitutional standard. For example, if the Gateway Complex common areas are public fora, Gateway may only “impose narrow, content-neutral time, place and manner restrictions to serve a significant interest, so long as there remain adequate alternative channels of communication.” Id. (citing Perry Education Assoc. v. Perry Local Educators’ Assoc., 460 U.S. 37, 45 (1983)). See Schwitzgebel v. City of Strongsville, 898 F. Supp. 1208, 1214-1219 (N.D. Ohio 1995) (O’Malley, J.), affirmed, 97 F.3d 1453 (6th Cir. 1996), cert. denied, 522 U.S. 827 (undertaking this three-step analysis). If, on the other hand, these areas, are nonpublic fora, they may be reserved “‘for [their] intended purposes, communicative or otherwise,’ through reasonable restrictions on expression, so long as the regulations are not based on hostility to the speaker’s views.” Calash, 788 F.2d at 82 (citing Perry, 460 U.S. at 46).

In order to shortcut this analysis – a necessity, given the proximity of Opening Day – the Court will essentially skip the first step by assuming Gateway is either a governmental entity or a state actor.¹⁰ This leaves the Court with two questions: (1) what type of fora are the common areas of the Gateway

¹⁰ Importantly, the Court notes that verification vel non of this assumption requires substantial additional analysis. For example, this Court has previously ruled that “Gateway is not a governmental actor.” NOCAB at *1. At first blush, the Court finds the reasoning of NOCAB persuasive, even in light of subsequent Supreme Court precedent, Lebron v. National R.R. Passenger Corp., 513 U.S. 374 (1995). Thus, the Court would need to analyze the “public function” and “symbiotic relationship” tests referenced previously. These are complex, fact-based inquiries which, in turn, involve complex legal theories. At this juncture, however, the Court simply does not have enough time to analyze these questions with sufficient thoroughness to reach a reasoned conclusion.

Complex?; and (2) do Gateway's restrictions on the use of those common areas satisfy the constitutional tests applicable to those fora?

A. Forum Analysis.

Plaintiffs assert that the Gateway Complex common areas are public fora, subject to the strictest level of scrutiny under the First Amendment. They base this assertion on the contention that these common areas are akin to public streets and sidewalks, which Plaintiffs assert are quintessentially public fora. As support for this claim, Plaintiffs cite to Mr. Chema's declaration, describing the design concepts behind the Gateway Complex, and also to those court decisions refusing to restrict First Amendment access to public thoroughfares. E.g., Venetian Casino Resort v. Local Join Exec. Bd. of Las Vegas, 42 F. Supp.2d 1027, 1035 (D. Nev. 1999); Citizens to End Suffering & Exploitation v. Faneuil Hall Marketplace, Inc., 745 F. Supp. 65, 71 (D. Mass. 1990). The Court is unpersuaded by Plaintiffs' arguments and instead concludes, on the current record, that the Gateway common areas are nonpublic fora, subject to a much lower level of scrutiny.

"Not all public places are public forums." International Society for Krishna Consciousness, Inc. v. New Jersey Sport & Exposition Authority, 691 F.2d 155, 159 (3rd Cir. 1982). The mere fact that property is intended for, and made open to, some public uses does not, alone, render that property a "public forum" for First Amendment purposes. Id. Thus, courts have concluded that sidewalks leading to a post office, streets and sidewalks in military bases, the steps of the United States Supreme Court, state fair grounds, sports complexes, and supermarket parking lots can all be considered nonpublic fora in the

appropriate circumstances.¹¹ Indeed, in concluding that, despite having been made openly available to the public, sidewalks and streets in a military base are not public fora under the First Amendment, the Supreme Court stated:

The guarantees of the First Amendment have never meant that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please. The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.

Greer, 424 U.S. at 836 (citations and internal quotation marks omitted).

The First Amendment inquiry, thus, does not begin and end with the “public” ownership or control of the property at issue, nor with the physical structure of the property. See Kokinda, 497 U.S. at 727 (1990) (“the mere physical characteristics of the property cannot dictate forum analysis”). Instead, “the primary factor in determining whether property owned or controlled by the government is a public forum is how the locale is used.” New Jersey, 691 F.2d at 160; see also Pouillon v. City of Owosso, Mich., 2000 WL 279540 at *4 (6th Cir. Mar. 16, 2000) (“in most of these cases, the issue is decided by

¹¹ See United States v. Kokinda, 497 U.S. 720 (1990) (upholding a regulation prohibiting solicitation on a United States Post Office sidewalk); Greer v. Spock, 424 U.S. 828 (1976) (upholding a regulation prohibiting political speeches on a United States military base); United States v. Grace, 461 U.S. 171 (1983) (upholding a statute prohibiting political speech on the grounds of the United States Supreme Court); Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640 (1981) (upholding a rule prohibiting peripatetic distribution on state fair grounds of any merchandise or written materials); International Society for Krishna Consciousness, Inc. v. New Jersey Sport & Exposition Authority, 691 F.2d 155, 159 (3rd Cir. 1982) (upholding policy of prohibiting solicitation of money and distribution of literature and other goods at sports complex); Calash, 788 F.2d at 82 (upholding policy of limiting access to a municipal stadium to civic, charitable, and nonprofit organizations); Hubbard Broadcasting, Inc. v. Metropolitan Sports Facilities Comm’n, 797 F.2d 552 (8th Cir. 1986), cert. denied, 479 U.S. 986 (1986) (upholding a policy of selling advertising space on a scoreboard in a sports complex to a limited number of advertisers); Lloyd Corp., Limited v. Tanner, 407 U.S. 551 (1972) (upholding a regulation prohibiting distribution of handbills at a large shopping center).

reference to the history of the building's use"). In this context, it is not enough that the public is invited or permitted onto the property; an assessment of the purposes for which the public is permitted onto the property, and whether the owner has reserved and exercised the right to exclude the public from the property, is necessary. Kokinda, 497 U.S. at 728-29.

In addition, in assessing the First Amendment character of the property, the Court must consider whether the nature of the property is consistent with expressive activity. Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. 788, 802-03 (1985). "Where the principal function of the property is disrupted by expressive activity, the Court [should be] particularly reluctant to hold that the government intended to designate a public forum." Id.

All of these inquiries are necessary because a state actor does not create a public forum by default or inaction; only a conscious intention to open a forum for public discourse will suffice. Id. Indeed, even permitting selective access to a governmental forum for some expressive activity will not suffice to "add up to the dedication of the property to speech activities." Kokinda, 490 U.S. at 730.

Applying these tests, the Court concludes that the Gateway Complex common areas are nonpublic fora.¹² The enabling legislation contemplates and authorizes the building of a "sports complex." The

¹² The Court again emphasizes the preliminary nature of its analysis. Plaintiffs did not invite the Court to differentiate between portions of the common areas – e.g., between the sidewalks and the plazas, or between one plaza and another – in their arguments. Indeed, Plaintiffs' proposed march and demonstration would not seem to permit any parsing of the property; for at least some period of the day, the Plaintiffs want to engage in collective and concerted demonstrations and protests on most of the common areas in the complex. The Court could foresee, upon further inquiry, the possibility of applying a different analysis to different portions of the common areas. The Plaintiffs' current request does not merit undertaking such an analysis now, however, and the time allotted to this emergency request does not permit it.

Gateway corporate documents so far submitted indicate that Gateway carried out that purpose, and that other benefits inuring to the redevelopment of the City of Cleveland, even if hoped for and anticipated, were incidental to that purpose.¹³ The evidence submitted similarly reveals that Gateway maintains and operates all aspects of its property with that purpose in mind – to facilitate and ensure the efficient conduct of athletic and other events at its sports facilities. And, the un rebutted evidence at trial reveals few days during the course of a typical year during which the complex is not being used for those precise purposes.

The evidence also reveals, moreover, that, from its inception, Gateway has reserved and exercised the right to exclude individuals from the Gateway Complex whenever exclusion was deemed beneficial to the intended purposes of the sports facilities. Thus, Gateway promised its tenants that it would prohibit solicitation, protests, demonstrations, and events during game times or “event periods.” Gateway has kept that promise by excluding various would-be users of the property during event periods and by continuing to claim the right to do so, including through defense of this and the Helphry litigation. And, Gateway has continuously and consistently exercised the right to define the nature and character of access to its property through the use of barricades, security staff, and other measures.

Finally, the only evidence submitted regarding actual use of the common areas during events was proffered by Gateway. That testimony disclosed very little pedestrian or public use of either the Gateway plazas or Gateway Sidewalks during non-event periods, a point which is unsurprising given the location of Gateway and the absence of “destination locations” on at least two of its sides.

¹³ Mr. Chema’s declaration is not inconsistent with this conclusion. Urban architectural design concepts often contemplate schemes which “open” a facility or property to the surrounding cityscape. These design elements do not translate, however, into a governmental desire to create a public forum to be used for unfettered expression of ideas.

On the strength of this evidence, the Court concludes that the Gateway Complex is essentially a “commercial venture,” it is “designed to bring economic benefits to [the Cleveland area],” it “earns money by attracting and entertaining spectators with athletic events,” and “it is not unreasonable for [Gateway] to prohibit outside groups from engaging in activities which are counter productive to its objectives.” New Jersey, 691 F.2d at 161. As such, the Court concludes that the Gateway Complex is not a public forum for First Amendment purposes. See id. (finding that Meadowlands racetrack is not a public forum and is, thus, permitted to prohibit solicitation on its grounds); Kokinda, 497 U.S. at 728 (finding that a “postal sidewalk constructed solely to assist postal patrons to negotiate the space between the parking lot and the front door of the post office” and was not a public forum).

B. Constitutionality of the Regulations.

Having concluded that the common areas of the Gateway Complex are nonpublic fora “does not end the inquiry.” Calash, 788 F.2d at 84 (holding that Kennedy Stadium is a nonpublic forum). The Court “must now determine whether the restrictions on the [Plaintiffs’] speech involved here are reasonable and content-neutral.” Hubbard Broadcasting, Inc. v. Metropolitan Sports Facilities Comm’n, 797 F.2d 552, 556 (8th Cir. 1986).

As noted, Gateway may reserve nonpublic fora “‘for [their] intended purposes, communicative or otherwise,’ through reasonable restrictions on expression, so long as the regulations are not based on hostility to the speaker’s views.” Calash, 788 F.2d at 82 (citing Perry, 460 U.S. at 46). Thus, the Court must examine: (1) whether Gateway’s expression-restricting policies reasonably reserve the common areas for their intended purposes; and (2) whether Gateway’s policies are based on hostility to the message of

any speaker.

With regard to the first question, a policy which restricts expression in a nonpublic forum is reasonable if “it is wholly consistent with the [property-owner’s] legitimate interest in ‘preserv[ing] the property . . . for the use to which it is lawfully dedicated.’” Perry, 460 U.S. at 50. Gateway states (and the evidence presented confirms) that the intended purpose of the Gateway Complex is to present athletic events. Similarly, the intended purpose of the common areas is to facilitate pedestrian traffic flow, and ingress and egress to the stadium and arena, for viewing of those athletic events. Gateway asserts that its policy of prohibiting persons from soliciting or demonstrating on the common areas is designed to ensure that ingress and egress remain unobstructed, to maintain crowd control, and to ensure the safety of pedestrian and automobile traffic.

The Court concludes that Gateway’s restrictions, which admittedly do serve to limit expression, are reasonable and consistent with preserving these stated purposes. Excluding demonstrators from areas through which the heaviest flow of pedestrians travel is a reasonable means to ensure those pedestrians can safely and efficiently enter the stadium and arena to view athletic events, and can do so without incident.¹⁴ Just as the defendant’s policy in Perry kept the public schools “from becoming a battleground for inter-union squabbles,” id. at 52, Gateway’s policy keeps the common areas of the complex from becoming

¹⁴ See Kokinda, 497 U.S. at 733-34 (“whether or not the [defendant] permits other forms of speech, . . . it is not unreasonable to prohibit . . . a particular form of speech that is disruptive of business . . . [because] it impedes the normal flow of traffic”).

gauntlets, rather than easy means of access.¹⁵ Certainly, Gateway’s policy is “not irrational.” Calash, 788 F.2d at 84.

Further, the Court concludes that Gateway’s policy is not motivated by hostility to the views of any specific message. Even accepting the proposition that Gateway would prefer not to hear speech accusing one of its two principal tenants of racism, there is no evidence that Gateway’s policy is directed at foreclosing that particular message. As noted above, Gateway has a track record of prohibiting persons from soliciting or demonstrating on Gateway’s common areas regardless of the content of their message – postulants for charities, unions, businesses, and churches have all been banned. Gateway’s policy is simple – no person can solicit or demonstrate in the common areas during, or just before and after, baseball games. Indeed, the only meaningful deviation from that policy is one in which Gateway, through the vehicle of the Final Agreed Order in Helphrey, has agreed to accommodate Plaintiffs’ particular message, albeit not to the degree Plaintiffs prefer.

The Plaintiffs argue, however, that, while Gateway has banned them from common areas, Gateway has not banned persons displaying the Indians’ team name and mascot in a supportive manner. The Plaintiffs assert this shows Gateway welcomes demonstrators supportive of the use of the Indians’ team name and mascot, while it excludes demonstrators critical of the name and mascot. This assertion ignores the obvious fact that pedestrians entering Gateway who are demonstrating support for the Indians are doing

¹⁵ While Plaintiffs might seek to assure the Court that they would not create a gauntlet through which fans would have to pass to reach Gateway’s stadium and arena, “the justification is not the discrete impact of plaintiff’s demonstration, it is the cumulative impact which would be caused by the presence of the many single and peaceful demonstrators who might choose to intrude upon ongoing events.” Heffron, 452 U.S. at 652-54

so in the context of visiting Gateway for its designed purpose. This is why the Supreme Court has been careful to note that “[t]he fact that [a property owner’s] policy makes distinctions on the basis of speaker identity does not render it unconstitutional,” because “[d]istinctions based on speaker identity are permitted in a nonpublic forum.” Calash, 788 F.2d at 84 (citing Cornelius). The “right to make distinctions in access on the basis of subject matter and speaker identity” are “inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property.” Perry, 460 U.S. at 49.¹⁶ This assertion also ignores the fact that patrons displaying Indians paraphernalia, though there are many of them, are doing so as individuals – not as a part of a concerted, organized demonstration. Individuals wearing apparel critical of “Chief Wahoo” or the Indians are similarly free to enter the stadium and to use the complex grounds for their intended purpose, assuming their behavior is otherwise lawful.¹⁷

In sum, the Court concludes that Gateway’s policies prohibiting demonstration in common areas on game days: (1) reasonably serves to preserve Gateway for its intended purposes; and (2) is not based on hostility to the message of any speaker. Accordingly, the Plaintiffs have not established a likelihood of success on the merits of their First Amendment claim, and their motion for preliminary injunction is denied.

¹⁶ The Plaintiffs also point out that the Gateway policy governing issuance of special event permits for non-game-days gives Gateway “unfettered discretion” to decide who may stage special events on Gateway common areas. Plaintiffs insist that because Gateway “reserves the right, in its sole and absolute discretion, to accept, reject, or accept upon conditions any Application for” a special event permit, it is engaged in an unconstitutional licensing scheme. The Court concludes, however, that Plaintiffs do not have standing to raise this argument. Plaintiffs admit they have never sought a special event permit, and thus have never been refused one. Further, Gateway’s policy regarding allowing persons to demonstrate on its common areas on non-game-days is clearly different from its policy on allowing persons to demonstrate on its common areas on game-days, and the latter policy is the only one put into issue by Plaintiffs’ motion for preliminary injunction.

¹⁷ Indeed, the presence at Gateway of persons wearing apparel bearing the image of Chief Wahoo is also contingent on lawful behavior.

IT IS SO ORDERED.

KATHLEEN McDONALD O'MALLEY
UNITED STATES DISTRICT JUDGE

